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In The Supreme Court of the United States

Richard E. Glossip, et al.,
Petitioners,

v.

Kevin J. Gross, et al.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

Amicus Brief in Support of Petitioners by The National Consensus Project The Promise of Justice Initiative

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INTERESTS OF AMICI CURIAE[1]

The Promise of Justice Initiative (PJI) is a non-profit law office dedicated to upholding constitutional integrity. PJI addresses issues concerning the fairness of the administration of capital punishment.

The National Consensus Project (NCP) is an affiliation of scholars, researchers and lawyers dedicated to understanding the evolving standards of decency that mark a maturing society. NCP collects and provides data for use by scholars and litigators in assessing, *inter alia*, the objective indicia of society's standards, as expressed in legislative enactments and state practice. Members of the NCP have published analyses in various peer review journals, including the American Constitution Society for Law and Policy, and Cardoza Law Review.

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[1] Pursuant to this Court's Rule 37, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief. Letters of consent by both parties were filed with the Court.

SUMMARY OF ARGUMENT

"When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

This Court has held that the Eighth Amendment draws its meaning from the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Eighth Amendment prohibits excessive punishment, which includes a ban on methods of punishment that inflict gratuitous suffering or an inhumane death.[2] And, because the administration of a punishment is subject to human error, the Constitution also forbids methods of punishment that carry an intolerable risk of gratuitous suffering.

This case focuses on the use of the drug midazolam to secure unconsciousness in a state's death penalty protocol. There is a broad national consensus against the use of midazolam for this purpose. Only four states have experimented with the use of midazolam; only four propose using it.[3] This consensus derives from the disinclination of

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[2] *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . ").

[3] *See* Appendix, at 7a.

jurisdictions to use a protocol that carries a significant risk of causing pain and suffering.

Seven years ago, in *Baze v. Rees*, this Court traced our nation's consensus as to method of execution, from hanging, to electrocution, and finally to a three-drug lethal injection protocol involving the ultra-short-acting barbiturate sodium thiopental. 553 U.S. 35, 41–44 (2008).[4] In upholding Kentucky's lethal injection protocol, the *Baze* plurality emphasized that thirty states and the Federal Government used the same three-drug combination in their respective protocols. The Court thus found that a "broad consensus" had emerged as to the objective tolerability of the risk of gratuitous suffering inherent in Kentucky's protocol. *Id.* at 53.

The Court emphasized that the selection of the specific protocol was "motivated by a desire to find a more humane alternative" and inspired by a commitment, described by a state legislator: "[i]f we

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[4] "By the middle of the 19th century, hanging was the nearly universal form of execution in the United States. In 1888, following the recommendation of a commission empaneled by the Governor to find the most humane and practical method known to modern science of carrying into effect the sentence of death, New York became the first State to authorize electrocution as a form of capital punishment. By 1915, 11 other States had followed suit, motivated by the well-grounded belief that electrocution is less painful and more humane than hanging." *Baze*, 553 U.S. at 41–42 (quotations and citations omitted).

are going to do capital punishment, it needs to be done in the most humane manner." *Id.* at 42 n.1 (internal quotations omitted). The plurality opinion also distinguished between a risk of gratuitous suffering, as the result of an "isolated mishap," and "a hypothetical situation" in which a "series of abortive attempts" at an execution could have occurred. *Id.* at 50.

Much has changed in the seven years since this Court upheld Kentucky's execution protocol in *Baze*. First, there has been a significant decline in the use of capital punishment in the majority of states, and a growing concern about the dignity of the execution process. The risk of "a series of abortive attempts"[5] is also no longer hypothetical.[6]

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[5] *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring).

[6] Following this Court's decision in *Baze*, in 2009, Ohio tried unsuccessfully to execute Romell Broom. After two hours and eighteen attempts to set an IV line, the governor issued a temporary reprieve. *See Reynolds v. Strickland*, 583 F.3d 956, 957 (6th Cir. 2009) (Cole, J., concurring) (noting the "eighteen unsuccessful efforts to run an intravenous line into Romell Broom's veins over the course of two hours"). Additionally, prison officials called off the execution of Clayton Lockett who had initially been declared to be unconscious and then exhibited clear signs of consciousness; Mr. Lockett died forty-three minutes later. Erik Eckholm & John Schwartz, *Timeline Describes Frantic Scene at Oklahoma Execution*, N.Y. TIMES, May 1, 2014, *available at* http://www.nytimes.com/2014/05/02/us/oklahomaofficialcalls-for-outside-review-of-botched-execution.html.

An outlier handful of states have experimented with the use of midazolam—a drug not part of the three-drug protocol upheld in *Baze*. These experiments have produced undignified results in Arizona, Ohio, and Oklahoma.[7]

Arizona and Ohio have since changed their protocols.[8] Other states that had previously authorized the use of midazolam also abandoned it after the executions of Dennis McGuire (Ohio),

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[7] *See Warner v. Gross*, 135 S. Ct. 824 (2015) (Sotomayor, J., dissenting) ("Lockett awoke and writhed on the execution table for some time after the drugs had been injected ."). *See also id.* at 827 ("Likewise, in Arizona's July 23, 2014, execution of Joseph Wood, the condemned inmate allegedly gasped for nearly two hours before dying, notwithstanding having been injected with the drug hydromorphone and 750 milligrams of midazolam "); Erica Goode, *After a Prolonged Execution, Questions Over 'Cruel and Unusual,'* N.Y. TIMES, Jan. 18, 2014, at A12 (noting that McGuire made "gasping, snorting and choking sounds" over the course of twenty-five minutes).

[8] Arizona has retained one-drug protocols using pentobarbital or thiopental and removed a two-drug protocol using midazolam, while adding a three-drug protocol using thiopental or, as a last resort, midazolam. Letter from Charles Ryan, Director, Arizona Dept. of Corr., to Janice Brewer, Arizona Governor (Dec. 22, 2014), *available at* corrections.az.gov/sites/default/files/documents/PDFs/letter_to_governor_brewer.pdf. Ohio has removed midazolam from its protocol and has postponed all executions. Press Release, Ohio Dept. of Rehabilitation and Correction, Ohio Revises Lethal Injection Protocol (Jan. 8, 2015), *available at* drc.ohio.gov/Public/press/press436.htm.

Clayton Lockett (Oklahoma), and Joseph Wood (Arizona).[9] Oklahoma, however, seeks to continue to use midazolam in its three-drug protocol.

Unlike in *Baze*, there is no broad national consensus that supports Oklahoma's position that the use of midazolam entails a tolerable risk of gratuitous suffering. Indeed, the broad consensus is against the use of experiment with midazolam. Oklahoma is one of only two states—Florida is the other—where a condemned inmate faces a reasonable likelihood of being executed with a protocol that includes midazolam. Several other states have contemplated using midazolam, but each has either withdrawn its protocol or identified alternate protocols to ensure the execution is not unnecessarily cruel or unusual. As such, in forty-six states, and also in the District of Columbia and in the Federal system, midazolam is unlikely to play a role in future executions.

The already realized and ongoing intolerable risk of gratuitous suffering, along with broad consensus of states that resist using midazolam because of its risk of gratuitous suffering, warrants invalidation of Oklahoma's execution protocol. But

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[9] *See, e.g.*, Associated Press, *Kentucky Drops 2-Drug Executions, Reworking Method*, WLWT 5, Nov. 14, 2014, *available at* http://www.wlwt.com/news/kentucky-drops-2drug-executions-reworking-method/29716428 (stating that "prosecutors cited 'recent events in other states'" as the reason for removing the midazolam protocol).

these are perhaps not the most disquieting aspects of Oklahoma's protocol: the available evidence gives at least the appearance that the state persists with its use of midazolam not because careful deliberation has led its officials to believe that midazolam is humane, but instead because using midazolam is expedient. This Court should invalidate Oklahoma's execution protocol and hold that the risk of gratuitous suffering inherent in the use of midazolam is intolerable.

ARGUMENT

I. OBJECTIVE INDICATORS REVEAL THE PREVAILING STANDARDS OF DECENCY.

Objective indicators aid the Court's effort to determine whether a punishment practice or method is consistent with contemporary standards of decency. In *Roper v. Simmons*, for example, the Court counted 30 states that rejected the death penalty for juvenile offenders—"12 that ha[d] rejected it altogether and 18 that maintain[ed] it but, by express provision or judicial interpretation, exclude[d] juveniles from its reach." *Roper v. Simmons*, 543 U.S. 551, 564 (2005). *See also Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) (noting the consistent approach of measuring the objective indicia of consensus).

The Court has also rejected the death penalty for intellectually disabled offenders after detecting a national consensus against the practice. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002). In addition to the 30 states that had formally barred the death penalty at the time of *Atkins*—either generally or specifically for the intellectually disabled—the Court also noted states like New Hampshire and New Jersey: though such states "continue[d] to authorize executions," neither one had performed an execution in decades, which meant "there [was] little need to pursue legislation barring the execution of the mentally retarded in those States." *Id. See also Kennedy v. Louisiana*, 554 U.S. at 433 ("There are measures of consensus

other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society.").

Most recently, in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court also indicated that long-term disuse coupled with executive action counted against the permissibility of a challenged punishment practice. *Id.* at 1997 (placing "on the abolitionist side of the ledger" the "18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years."). In each of these opinions, the Court recognized that the risk of cruel and unusual punishment was sufficient to warrant prohibiting the execution of an entire class.[10]

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[10] In *Simmons*, *Atkins*, and *Hall*, the Court recognized that not all juvenile or all intellectually disabled offenders had diminished culpability in a way that required exemption from execution; rather, in each instance, the Court recognized that the *risk* of executing individuals in a manner that was cruel and unusual required exemption of the entire class. For example, in *Simmons*, the Court interpreted the consensus against the juvenile death penalty to flow not necessarily from the rigid belief that no juvenile could ever possess sufficient culpability to warrant a death sentence, but rather as a marker that society cannot tolerate the risk that "a youthful person" might "receive the death penalty despite insufficient culpability." *Id.* at 572–73.

II. THE USE OF MIDAZOLAM IS NOT COUNTENANCED IN FORTY-SIX STATES.

Reviewing the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions," *Kennedy*, 554 U.S. at 408, reveals a growing resistance to the risk of cruel and unusual punishment in the form of a drug protocol utilizing midazolam.

Of the fifty-two jurisdictions in the United States (fifty states, the District of Columbia, and the Federal government), there is no reasonable likelihood that an execution involving midazolam will occur in forty-six states.[11] The District of Columbia, and the Federal system also reject the use of midazolam. These decisions are strong "objective indicia of consensus." There are fewer than five jurisdictions in which midazolam might realistically be used in an execution.

A. Thirty-One Jurisdictions Either Have No Capital Punishment, Or Have No Likelihood Of Executing A Person In The Near or Distant Future

Thirty-one jurisdictions have either abolished capital punishment, suspended the death penalty, or have no likelihood of execution in the

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[11] The information identified in this section relevant to state protocols is placed in the Appendix, attached to this brief for ease of reference.

near to distant future. None of these jurisdictions contemplate using midazolam.

1. Nineteen jurisdictions have abolished capital punishment.

Eighteen states[12] plus the District of Columbia have abolished the death penalty. Six of these states have abolished capital punishment in the past eight years: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013),[13] and four of these have done so since *Baze*.

2. Four additional jurisdictions have suspended the death penalty and exhibit long-term disuse.

Four additional jurisdictions have moratoria in place, suspending use of the death penalty, and a long history of disuse consistent with the measure the Court used in *Hall*. As the Court observed in *Hall,* states that have suspended use of the death

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[12] See Appendix at 1a noting abolition in Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

[13] Of those six states, only New Mexico and Connecticut still have individuals on death row. Neither of those states proposes to use midazolam in any future executions that may occur. See Appendix 1a & endnote **Error! Bookmark not defined.**, **Error! Bookmark not defined.**.

penalty, coupled with long term disuse are similar to those that have abolished the punishment. *Id.* at 1997 (placing "on the abolitionist side of the ledger" "Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years.").

The growing concern over the ability of States to humanely execute condemned offenders has contributed to formal moratoriums in four states: Colorado,[14] Oregon, Pennsylvania, and Washington.[15]

Colorado has executed one individual since 1967. Oregon has executed two individuals since 1962. Pennsylvania has executed only three

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[14] Governor Hickenlooper, when explaining his moratorium on executions in Colorado, specifically referenced the botched execution of Clayton Lockett (which used midazolam) in Oklahoma: "This is the kind of thing that a number of people, not everyone, but a number of people . . will stop, think about it, and maybe people will change their opinions." *See* Whitney Wild, *Governor, DA weigh in on botched execution*, 9 NEWS, Apr. 30, 2014, *available at* http://www.9news.com/story/news/local/2014/05/01/governor-da-weigh-in-on-botched-execution/8549209/. *See also* Mike Littwin, *The Rush To More Botched Executions*, THE COLORADO INDEPENDENT, May 2, 2014, *available at* http://www.coloradoindependent.com/147293/littwin-the-rush-to-more-botched-executions ("Now we can understand why John Hickenlooper decided to grant Nathan Dunlap his temporary reprieve last year.").

[15] *See* Appendix at 2a.

individuals since 1962; each was a volunteer. Washington has executed five individuals since 1963.[16]

3. Three additional jurisdictions have exhibited long-term disuse and have no potential prospective use in the near or distant future.

Three additional states—New Hampshire, Wyoming, and Kansas—exhibit a long-term disuse of capital punishment, coupled with an exceedingly rare prospect of future executions.

Though it retains the death penalty by statute, New Hampshire has not performed an execution in 86 years; it has only one occupant on the death row, and that case has yet to complete direct appellate review. Wyoming has executed one person in the last 50 years, and its death row is empty. Kansas, as the *Hall* Court noted, "has not had an execution in almost five decades." *Hall*, 134 S. Ct. at 1997. Indeed, since adopting its current

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[16] All data concerning the date of last execution and the number of executions is drawn from The Espy File, which catalogs all executions in the United States between 1608 and 2002. M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608–2002: The ESPY File*, DEATH PENALTY INFO. CTR., *available at* www.deathpenaltyinfo.org/documents/ESPYstate.pdf. Counsel also draws from the searchable database for all executions between 1976 and the current date. *Executions in the U.S. 1608–2002*, DEATH PENALTY INFO. CTR., *available at* www.deathpenaltyinfo.org/views-executions.

capital punishment statute in 1994, no death sentence has survived Kansas's initial appellate review.[17]

4. Five additional jurisdictions use capital punishment exceedingly sparingly and have no plan to use midazolam.

Five additional states—Idaho, Kentucky, Montana, Nebraska, and South Dakota—have performed only three executions each over the past 50 years. The lack of use in these states is similar, but not quite as strong, as the lack of use that the Court described in *Hall*, when discussing Kansas. Of the fifteen executions that these five states have performed, more than one-third (6 of 15) have involved inmates who withdrew their appeals and volunteered for execution.[18] Executions in these states are exceedingly rare. None of these states

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[17] None of these states contemplate using midazolam. Kansas and New Hampshire have no lethal injection protocol; Wyoming has promulgated a three-drug protocol but does not propose using midazolam. *See* Appendix at 3a.

[18] There have been only been three contested executions total in these five states in the last fifteen years. See Appendix at 4a noting each of the executions in these states and which executions occurred as a result of the condemned inmates decision to volunteer for execution (noted by a (V) in the appendix.)

have ever executed someone using midazolam, and none plan to execute an inmate with midazolam.[19]

In sum, thirty-one jurisdictions (thirty states and the District of Columbia) have either abolished the death penalty or have moratorium in place, and/or execute individuals exceedingly rarely. None of these jurisdictions provide evidence to support use of midazolam; all of these jurisdictions support the consensus that midazolam should not be used in an execution protocol.

B. Of The Twenty-One Jurisdictions That Retain and Use Capital Punishment with Some Regularity, the Vast Majority Reject Oklahoma's Experiment with Midazolam.

Of the twenty-one jurisdictions that use capital punishment, seventeen jurisdictions do not currently have a protocol that uses midazolam. Eight have adopted a one-drug protocol that does

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[19] Idaho proposes a one-drug protocol using a three drug protocol using sodium penthol, or a two drug protocol using pentobarbital, or a one drug protocol using siodium pentothal or pentobarbital. See Appendix at 12a. n.27. Kentucky, while technically still appearing to have midazolam in its protocol, has specifically disavowed use of midazolam after the botched execution in Oklahoma. Id at n.28.. Montana proposes a two-drug protocol using pentobarbital and a paralytic. Id. at n. 29. Nebraska proposes a three-drug protocol using thiopental rather than midazolam. Id. at n. 30. South Dakota proposes a two-drug protocol using thiopental and a paralytic. Appendix at 13a n. 31.

not include midazolam: Arizona, Georgia, Missouri,[20] North Carolina, Ohio,[21] Tennessee, Texas, and Utah.[22] Five jurisdictions—Arkansas, California, Louisiana,[23] Nevada, and the Federal

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[20] Missouri administers midazolam, but as a pre-execution treatment for anxiety in line with – whatever the legal propriety -- its clinical use. *See* Chris McDaniel, *Missouri Uses Midazolam in its Most Recent Execution*, ST. LOUIS PUB. RADIO, Jan. 22, 2015, *available at* http://news.stlpublicradio.org/post/missouri-used-midazolam-its-most-recent-execution.

[21] Ohio stopped using midazolam after a series of botched executions. *See* Mark Berman, *Ohio Drops Controversial Lethal Injection Drug, Postpones Upcoming Execution*, THE WASHINGTON POST, Jan. 9. 2015 ("Ohio announced this week that it will no longer execute inmates with lethal injection drugs that were involved in two bungled executions last year, a change that will delay at least one execution and possibly others scheduled for this year.").

[22] *See* Appendix at 5a. In addition, Idaho and Washington, mentioned in Section III (B), have also adopted a one-drug protocol.

[23] In 2014, the Louisiana Legislature enacted a Department of Corrections led Commission to "study and make recommendations relative to the different forms of execution and the method of execution to determine the best practices for administering the death penalty in the *most humane manner*." *See* LA LEGIS H.R. 142 (2014), 2014 La. Sess. Law Serv. Hs. Res. 142 (WEST). The Report on Study of Methods of Execution & Recommendations for Procedures was issued by the Louisiana Dept. of Public Safety and Corrections on February 18, 2015. The report recommends utilizing a one-drug protocol of 5 gm of pentobarbital, and also recommends that the legislature consider nitrogen hypoxia as an alternate method. Della Hasselle, *Death Penalty Study Suggests Using*

Government—are in the process of formulating a protocol.[24] Four more jurisdictions—Delaware, Indiana, Mississippi, and South Carolina—have proposed using the three-drug protocol upheld in *Baze*.[25]

Only four states—Oklahoma, Florida, Alabama, and Virginia—have protocols in place that realistically propose using midazolam.[26] Of these four states, only Oklahoma and Florida have ever used the protocol.[27]

Nitrogen to Carry Out Executions, THE LENS, Mar. 4, 2014. *available at* http://thelensnola.org/2015/03/04/death-penalty-study-suggests-using-nitrogen-to-carry-out-executions/ (discussing DPSC recommendations to legislature of adopting nitrogen hypoxia method).

[24] *See* Appendix at 6a. Kansas, New Hampshire, Oregon, and Kentucky, discussed *supra*, Section III (B), are also in the process of developing a new protocol.

[25] Though they differ on whether to use thiopental or pentobarbital for the purpose of securing unconsciousness, none of these last four states use midazolam as part of their protocol.

[26] *See* Appendix at 7a. Arizona has a protocol in place that still allows for the use of midazolam, but only as an alternative to viable other options and as a last resort.

[27] Virginia and Alabama have proposed using midazolam as the first drug in a three-drug protocol but have not yet used the protocol. While amici counts Virginia and Alabama with Oklahoma and Florida for purposes of assessing whether a national consensus against the use of midszolam exists, there

In *Kennedy v. Louisiana*, the Court stated, "[t]hough our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind." 554 U.S. at 426. The Court observed: "The evidence here bears a closer resemblance to the evidence of state activity in *Enmund*, where we found a national consensus against the death penalty for vicarious felony murder despite eight jurisdictions having authorized the practice." *Id.* at 433. Here, no matter how the states are tallied,[28] only four currently have protocols that could reasonably result in the use of midazolam in an execution.

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is no certainty that they will use the protocol. *Cf Kennedy v. Louisiana*, 554 U.S. at 431 ("It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted. There are compelling reasons not to do so here. Since the briefs were submitted by the parties, legislation in two of the five States has failed.").

[28] In *Kennedy v. Louisiana*, where the parties disagreed whether there were four states that authorized capital punishment for non-homicide offenses, *id.* at 424 (Petitioner claiming that Georgia would not count), or six such states, *id.* (Respondent claiming that Florida would count), the Court explained that "[d]efinitive resolution of state-law issues is for the States' own courts, and there may be disagreement over the statistics," *id.* at 425.

C. Even In the Jurisdictions That Permit Use of Midazolam, It Has Been Used Rarely

The objective indicia reflected in executions reveal that the evolving standards of decency reserve use of the death penalty in a humane manner.

Not only is the presence of midazolam in current protocols minimal, the usage of midazolam is exceedingly rare. "There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether [the challenged punishment] is regarded as unacceptable in our society." *Kennedy v. Louisiana*, 554 U.S. at 433.

The objective indicia clearly establish a national consensus. Only fifteen people have been executed with midazolam. While four were visibly problematic, there is a heightened risk that in the remaining eleven executions midazolam did not prevent pain and suffering by producing a deep unconsciousness; rather there is a significant risk that midazolam's failure to produce deep unconsciousness was masked by a paralytic agent that simultaneously caused severe and inhumane pain.

Based upon these inhumane results, Ohio and Arizona have ceased using midazolam. Other states, such as Colorado and Kentucky, at one point had midazolam in their protocols but have now

disavowed its use. Louisiana had similarly offered midazolam as an alternative method, but the Legislature created a study commission on the issue after the Oklahoma botched execution and recommended against its use

Indeed, while midazolam has been readily available for the last five years, the vast majority of jurisdictions—including California, Arkansas, North Carolina, and the Federal government—have preferred caution rather than the undertaking the risk of intolerable pain and suffering.

III. USE OF MIDAZOLAM TO SECURE UNCONSCIOUSNESS IN AN EXECUTION PROTOCOL CARRIES A REALIZED, ONGOING, AND INTOLERABLE RISK OF INFLICTING GRATUITOUS SUFFERING.

Midazolam was not one of the drugs in the *Baze* protocol. The protocol that the Court considered in *Baze* contained three drugs: sodium thiopental, an ultra-fast-acting barbiturate sedative that induces a "deep, comalike [sic] unconsciousness;" pancuronium bromide, a paralytic agent that prohibits muscle movement and quiets breathing; and potassium chloride, which causes cardiac arrest. *Baze v. Rees*, 553 U.S. 35, 43–44 (2008). Though the *Baze* petitioners feared that Kentucky's three-drug protocol could result in gratuitous suffering, the prospect of that suffering was based on maladministration rather than risks inherent in the drugs themselves. *Id.* at 62. The condemned in *Baze* proposed a one-drug protocol that a number of states have now adopted. *Id.* at 55.

Four states have neither adopted the one-drug protocol nor adhered to the *Baze* protocol. Alabama, Virginia, Oklahoma, and Florida substitute the benzodiazepine drug midazolam for the barbiturate sodium thiopental.[29]

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[29] *See* Appendix at 7a. Two additional states—Arizona and Ohio—have previously used midazolam in a two-drug protocol

Baze explained that sodium thiopental, when properly administered, "ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs." *Id.* at 44. The problem with substituting midazolam for sodium thiopental is that midazolam cannot reliably induce the desired deep, coma-like unconsciousness. In other words, it does not reliably prevent "the pain associated with the paralysis and cardiac arrest." *Id.*

Petitioner's *Brief* outlines the series of what can only be described as botched or undignified executions involving midazolam. Here, amici avoids the spectacle of recounting these executions but notes that the nation watched as several experiments with midazolam executions failed in 2014: first in Ohio, then Oklahoma, and finally in Arizona. In Ohio, Dennis McGuire gasped, choked, clenched his fists, and appeared to struggle against his restraints for ten to fifteen minutes after being injected with midazolam and hydromorphone.[30] Then, in Oklahoma, Clayton Lockett grimaced and tensed his body several times over a three-minute period before officials lowered the blinds. After

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along with the opioid hydromorphone. Both appear to have discontinued that protocol.

[30] *See* Erica Goode, *After a Prolonged Execution in Ohio, Questions over 'Cruel and Unusual,'* N.Y. TIMES, Jan. 17, 2014, *available at* http://www.nytimes.com/2014/01/18/us/prolonged-execution-prompts-debate-over-death-penalty-methods.html

being declared unconscious ten minutes into the process, Lockett spoke at three separate moments. He was announced dead thirty minutes later.[31] Finally, in Arizona, Joseph Wood gasped 660 times over a two-hour period before he was declared dead.[32]

In response to the Lockett execution, the President directed the Attorney General to review the state and federal process.[33]

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[31] *See* Eric Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES, Apr. 29, 2014, *available at* http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html.

[32] *See* Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, N.Y. TIMES, Jul. 23, 2014, *available at* http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html.

[33] The New York Times noted that "President Obama declared this week's botched execution in Oklahoma 'deeply disturbing' and directed the attorney general on Friday to review how the death penalty is applied in the United States at a time when it has become increasingly debated." Peter Baker, *Obama Orders Policy Review on Executions*, N.Y. TIMES, May 3, 2014, *available at* http://www.nytimes.com/2014/05/03/us/flawed-oklahoma-execution-deeply-troubling-obama-says.html.

IV. OKLAHOMA'S DECISION TO ADOPT MIDAZOLAM OUT OF EXPEDIENCE IS INCONSISTENT WITH THE EVOLVING STANDARDS OF DECENCY

The adoption of Oklahoma's execution protocol is concerning because it appears that expediency—and not careful deliberation—drove the inclusion of midazolam in the state's three drug protocol. The *Baze* opinion observed that the state's purpose in adopting the protocol was borne out of "a desire to find a more humane alternative." *Baze*, 553 U.S. at 42 n.1. Here, however, Oklahoma's decision to use midazolam fits more closely with an expediency narrative than it does a narrative of careful, thoughtful deliberation. As noted by Justice Sotomayor, dissenting from the denial of a stay of execution in this case, Oklahoma's expert "appeared to rely primarily on the web site www.drugs.com" in forming his opinion that the protocol would work. *Warner v. Gross*, 135 S. Ct. 824, 827 (2015) (Sotomayor, J., dissenting).

"When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy*, 554 U.S. at 420. The choice of execution protocol based upon *expedience* reflects an undignified response to the challenging question of how the government administers capital punishment. The constitution requires that where capital punishment is imposed, it be implemented in a humane manner.

The vast majority of jurisdictions take steps to ensure that capital punishment is administered humanely. Oklahoma's experimental method neither reflects the national approach to capital punishment as it has been nor as we would want it to be. *See Hall*, 134 S. Ct. at 1992 (explaining that "[t]he Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.").

CONCLUSION

For the forgoing reasons, amici respectfully suggest that the Court reject Oklahoma's experimental protocol.

Respectfully submitted,

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JURISDICTIONS WITHOUT CAPITAL PUNISHMENT

State	Date of Abolition
Mich. [1]	1847
Wis. [2]	1853
Me. [3]	1887
Minn. [4]	1911
Alaska [5]	1957
Haw. [6]	1957
Iowa [7]	1965
W Va. [8]	1965
Vt. [9]	1972
N.D. [10]	1973
D.C. [11]	1981
Mass. [12]	1984
R.I. [13]	1984
N.J. [14]	2007
N.Y. [15]	2007
N.M. [16]	2009
Ill. [17]	2011
Conn. [18]	2012
Md. [19]	2013

JURISDICTIONS WITH MORATORIUM

State	Date of Morato-rium	Status of Current Protocol	Date of Last Executions
Colo. [20]	5/22/2013	3-drug sodium thiopental	**2/06/1967** 10/13/97
Or. [21]	11/22/2011	No valid protocol in place.	**8/20/1962** 5/16/97 (V) 9/06/96 (V)
Pa. [22]	2/15/2015	(1) 3-drug pentobarbital or (2) 3-drug sodium thiopental	**2/4/1962** 5/02/95 (V) 8/15/95 (V) 7/06/99 (V)
Wash. [23]	2/11/ 2014	(1) 3-drug pentobarbital or (2) 3-drug sodium thiopental	**6/20/1963** 1/05/93 (V) 5/27/94 10/13/98 8/21/01 (V) 9/10/10

JURISDICTIONS WITH LONG-TERM DISUSE AND NO NEAR-TERM PROSPECTIVE USE

State	Number of people on death row	Status of Current Protocol	Date of Last Executions
Kan.[24]	10 (0)	No valid protocol in place.	**6/22/1965**
N.H.[25]	1 (0)	2-drug protocol.	**7/14/1939**
Wyo.[26]	0	No valid protocol in place.	**10/12/1965** 10/12/1965 1/22/1992

JURISDICTIONS WITH LONG TERM DISUSE

State	Number of people on death row	Status of Current Protocol	Date of Last Executions
Idaho [27]	11	3-drug protocol	**10/18/1957** 1/06/1994 (V) 11/18/2011 6/12/2012
Ky.[28]	35	No operational protocol.	**2/3/1962** 7/19/1997 5/25/1999 (V) 11/21/2008 (V)
Mont. [29]	2	2-drug protocol not currently operational.	**9/10/1943** 5/10/1995 2/24/1998 8/11/2006 (V)
Neb.[30]	11	3-drug protocol not currently operational	**6/25/1959** 9/02/1994 7/17/1996 12/02/197
S.D.[31]	3	3-drug protocol with 1- drug protocol alternative.	**8/4//1947** 7/11/2007 (V) 10/15/2012 (V) 10/30/2012

JURISDICTIONS USING ONE DRUG PROTOCOL

State	Status of Current Protocol
Ariz. [32]	(1) 1-drug pentobarbital; (2) 1-drug sodium thiopental; (3) 3-drug incl. sodium thiopental; or (4) 3-drug incl. midazolam
Ga. [33]	1-drug pentobarbital
Mo. [34]	5 g pentobarbital
N.C. [35]	5 g pentobarbital
Oh. [36]	5 g pentobarbital or 5 g thiopental sodium
Tenn. [37]	1-drug pentobarbital
Tex. [38]	1-drug pentobarbital
Utah [39]	1-drug sodium thiopental

JURISDICTIONS FORMULATING A PROTOCOL

State	Status of Current Protocol
Ark. [40]	Method of Execution Ac t is under judicial review.
Cal. [41]	State has stopped defending previous 3-drug protocol.
La. [42]	Method of execution is under legislative consideration; prior 1-drug protocol under separate judicial review.
Nev. [43]	Prison where executions are performed has closed, unclear how many usable drugs remain.
Fed. [44]	Protocol still undergoing review.

JURISDICTIONS USING *BAZE* PROTOCOL

State	Status of Current Protocol
Del. [45]	3-drug protocol using sodium thiopental; or 3-drug protocol using pentobarbital
Ind. [46]	3-drug protocol using sodium thiopental
Miss. [47]	3 drug protocol using 2 g pentobarbital, 50 mg pavulon, 50 mEq potassium chloride
S.C. [48]	3-drug protocol using pentobarbital

JURISDICTIONS PROPOSING USE OF MIDAZOLAM

State	Status of Current Protocol
Va. [49]	(1) 3-drug protocol incl. midazolam, (2) 3-drug protocol incl. pentobarbital, or (3) 3-drug protocol incl. sodium thiopental
Ala. [50]	500 mg midazolam; 600 mg procuronium bromide; 240 mEq potassium chloride

JURISDICTIONS ACTUALLY USING MIDAZOLAM

State	Status of Current Protocol
Okla. [51]	50 mg midazolam and 50 mg hydromorphone, 100 mEq potassium chloride; or 100 mg midazolam, 40 mg vecuronium bromide, 200 mEq potassium chloride
Fla. [52]	500 mg midazolam; 100 mg vecuronium bromide; 240 mEq potassium chloride

ENDNOTES FOR APPENDIX

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[1] Michigan has not had the death penalty since 1847. *See* www.deathpenaltyinfo.org/states-and-without-death-penalty.

[2] Wisconsin has not had the death penalty since 1853. Id.

[3] Maine has not had the death penalty since 1887. Id.

[4] Minnesota has not had the death penalty since 1911. Id.

[5] Alaska has not had the death penalty since 1957. Id.

[6] Hawaii has not had the death penalty since 1957. Id.

[7] Iowa has not had the death penalty since 1965. Id.

[8] West Virginia has not had the death penalty since 1965. Id.

[9] Vermont has not had the death penalty since 1972. Id.

[10] North Dakota has not had the death penalty since 1973. Id.

[11] The District of Columbia has not had the death penalty since 1981. Id.

[12] Massachusetts has not had the death penalty since 1984. Id.

[13] Rhode Island has not had the death penalty since 1984. Id.

[14] New Jersey has not had the death penalty since 2007. Id.

[15] New York has not had the death penalty since 2007. Id.

[16] New Mexico has not had the death penalty since 2009. Id. It has no protocol in place.

[17] Illinois has not had the death penalty since 2011. Id. A moratorium was imposed in 2000 and all subsequent death sentences commuted; last execution 3/17/99. John Schwartz, *Illinois Governor Signs Capital Punishment Ban*, NY TIMES, Mar. 9, 2011 (*available at* www.nytimes.com/2011/03/10/us/10illinois.html); Cornelia Grumman and Rick Pearson, *Ryan Agonized, But Confident He 'Did the Right Thing,'* CHICAGO TRIBUNE, Mar. 18, 1999 (*available at* articles.chicagotribune.com/1999-03-18/news/9903180130_1_case-of-anthony-porter-penalty-lorraine-borowski).

[18] Connecticut abolished the death penalty in 2012. State of Connecticut, Governor Dannel P. Malloy, *Gov. Malloy on Signing Bill to Repeal Capital Punishment*, Apr. 25, 2012 (*available at* www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122). The bill provides for prospective repeal only. A protocol for execution remains in place providing for: 2,500 mg thiopental sodium; 100 mg pancuronium bromide: 120 mEq potassium chloride State of Connecticut, Department of Correction, Administrative Directive No. 6.15: Administration of Capital Punishment, Attachment A, May 14, 2014 (*available at* www.ct.gov/doc/LIB/doc/PDF/AD/ad0615.pdf).

[19] Maryland abolished the death penalty in 2013. *See* Associated Press, *Maryland: Governor Signs Repeal of the Death Penalty*, N.Y. TIMES, May 2, 2013 (*available at* www.nytimes.com/2013/05/03/us/maryland-governor-signs-repeal-of-the-death-penalty.html); Alan Binder, *Life Sentences for Last Four Facing Death in Maryland*, N.Y. TIMES, Dec. 31, 2014 (*available at* www.nytimes.com/2015/01/01/us/maryland-governor-omalley-commutes-death-sentences-emptying-death-row.html).

[20] Office of the Governor, Executive Order D 2013-006: Death Sentence Reprieve, May 22, 2013, (*available at*

www.scribd.com/doc/143073608/Hickenlooper-Death-Sentence-Reprieve-for-Nathan-Dunlap) (granting temporary reprieve to death row prisoner, in part because the state was "not immediately equipped to carry out a death sentence" and "[r]ecent restrictions imposed by pharmaceutical companies and the Food and Drug Administration make procuring these drugs challenging."). The protocol in place provides for use of sodium pentothol, pancuronium bromide, and potassium chloride. Colorado Department of Corrections, *Execution Day* (undated) (*available at* www.doc.state.co.us/execution-day) (referring to "Department's lethal injection procedures, which provides the delivery of a lethal solution of sodium pentothol, pancuronium bromide, and potassium chloride.").

[21] Helen Jung, *Gov. John Kitzhaber Stops Executions in Oregon, Calls System 'Compromised and Inequitable'*, THE OREGONIAN, Nov. 22, 2011 (*available at* www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_stops_all_e.html). The legislature has provided a means of lethal injection. See ORS 137.473: *Means of Inflicting Death* (specifying "ultra-short-acting barbiturate in combination with a chemical paralytic agent and potassium chloride or other equally effective substances sufficient to cause death" but not identifying a specific barbiturate).

[22] Press Release, Governor Tom Wolf Announces a Moratorium on the Death Penalty in Pennsylvania, Feb. 13, 2015 (*available at* www.governor.pa.gov/Pages/Pressroom_details.aspx?newsid=1566#.VQCp4vnF98E). *See also* Associated Press, *Pennsylvania Governor Imposes Moratorium on Death Penalty*, N.Y. TIMES, Feb. 13, 2015. The protocol in place in Pennsylvania provides for a three-drug protocol consistent with the *Baze* protocol. *Chester v. Wetzel*, No. 08-1261, 2015 WL 632374, at *2 (M.D. Pa. Feb. 13. 2015) ("The protocol calls for the injection of three drugs in order to effectuate execution of the prisoner. The first drug injected into the prisoner will be either 5,000 mg of pentobarbital or 3 gm sodium

thiopental. Half of this first drug will be injected into the left arm, and the other half will be injected into the right arm.").

[23] Ian Lovett, *Executions are Suspended by Governor in Washington*, NY TIMES, Feb. 11, 2014. The protocol still provided precludes the use of midazolam. State of Washington, Dept. of Corrections, Policy No. DOC 490.200 "Capital Punishment," § (IX)(A)(4)(d) (*available at* www.doc.wa.gov/policies/showFile.aspx?name=490200).

[24] All of the data concerning dates of execution derive from *The Espy File, Executions in the U.S. 1608-2002: Executions by State*, located at www.deathpenaltyinfo.org/documents/ESPYstate.pdf and the searchable database of executions located at www.deathpenaltyinfo.org/views-executions (hereinafter "*Espy File*"). The method of execution in Kansas is prescribed by statute. *See* KS C. Cr. P. § 22-4001 (stating that "[t]he mode of carrying out a sentence of death in this state shall be by intravenous injection of a substance or substances in a quantity sufficient to cause death in a swift and humane manner" but not specifying any substances). None of the cases involving the condemned inmates have proceeded past an initial appellate review.

[25] *Espy File*, *supra* n.25. The method of execution in New Hampshire is prescribed by statute. N.H. Criminal Code. Title LXII, Ch. 630, § 630:5 Procedure in Capital Murder, Subsections XIII-XIV (referring to "continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent;" alternative of hanging). The single case involving a condemned inmate has not proceeded past appellate review.

[26] *Espy File*, *supra* n.25. The method of execution in Wyoming is prescribed by statute. Wyo. Stat. § 7-13-904. Method of execution ("(a) When sentence of death is imposed by the court in any criminal case, the punishment of death shall be executed by the administration of a continuous intravenous injection of a lethal quantity of an ultra-short-acting

barbiturate, alone or in combination with a chemical paralytic agent and potassium chloride, or other equally effective substance or substances sufficient to cause death (b) If the execution of the sentence of death as provided in subsection (a) of this section is held unconstitutional, the sentence of death shall be executed by the administration of lethal gas . . . ").

[27] *Espy File, supra* n.25. The Idaho protocol provides alternatively for: (1) 5 g sodium pentothal, 120 mg pancuronium bromide, 240 mEq potassium chloride; (2) 5 g pentobarbital, 120 mg pancuronium bromide, 240 mEq potassium chloride; (3) 5 g sodium pentothal; or (4) 5 g pentobarbital. Idaho Department of Correction, General Administration, Operations Division, Standard Operating Procedure No. 135.02.01.001, Version 3.6, Appendix A (May 18, 1998, reviewed Jan. 6, 2012, scheduled for review Jan. 6, 2014) (*available at* www.idoc.idaho.gov/content/policy/708) (This policy appears to be outdated but the DOC has not posted a more recent version).

[28] *Espy File, supra* n.25. Kentucky previously promulgated a protocol using midazolam. 501 KAR 16:330, Lethal Injection Protocols. § 3 (*available at* www.lrc.ky.gov/kar/501/016/330.htm). However it dropped the use of midazolam after the botched use. Associated Press, *Kentucky Drops 2-Drug Executions, Reworking Method*, Nov. 14, 2014 (*available at* www.wlwt.com/news/kentucky-drops-2drug-executions-reworking-method/29716428)

[29] *Espy File, supra* n.25. The Montana legislature has provided for administration of lethal injection. Montana Code Annotated, Title 46, Ch. 19, § 103(3) ("administration of a continuous, intravenous injection of a lethal quantity of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent"). The protocol was struck down in 2012. Laura Zuckerman, *Montana Judge Strikes Down State Execution Method*, WASHINGTON POST, Sept. 8, 2012 (*available at* www.washingtonpost.com/national/health-science/montana-judge-strikes-down-state-execution-

method/2012/09/08/4f34505a-f9e0-11e1-8398-0327ab83ab91_story.html).

[30] *Espy File*, *supra* n.25. The Nebraska protocol provides for the use of the *Baze* three drug protocol, with sodium thiopental, pancuronium bromide and potassium chloride. Nebraska Administrative Code, Title 69 – Department of Correctional Services, Chapter 11 – Execution Protocol, § 008. The supply of thiopental has expired. Joe Duggan, *Nebraska Lacks Drugs for Lethal Injections, Has No Way to Carry Out Executions*, OMAHA WORLD-HERALD, Feb. 4, 2014 (*available at* www.omaha.com/news/nebraska-lacks-drug-for-lethal-injections-has-no-way-to/article_4f2f70c0-d846-5582-86dc-3168b763b01a.html).

[31] *Espy File*, *supra* n.25. The South Dakota protocol provides various alternatives, none of which involve midazolam: (1) sodium thiopental, pancuronium bromide, potassium chloride; (2) pentobarbital, pancuronium bromide, potassium chloride; (3) sodium thiopental, pancuronium bromide; (4) pentobarbital, pancuronium bromide; (5) sodium thiopental; or (6) pentobarbital S. Dak. DOC Policy No. 1.3.D.3: Execution of an Inmate, Section (IV)(1)(A)(4) (effective Aug. 18, 2014) (*available at* doc.sd.gov/documents/about/policies/Execution%20of%20an%20Inmate.pdf).

[32] Letter from Charles L. Ryan, Director, Ariz. Dept. of Corrections, to Janice K. Brewer, Governor (Dec. 22, 2014) (*available at* corrections.az.gov/sites/default/files/documents/PDFs/letter_to_governor_brewer.pdf) (stating "it is my intent to retain the current one-drug protocols using either pentobarbital or sodium pentothal . and add two, three-drug protocols using either midazolam, vecuronium bromide, and potassium chloride or sodium pentothal, cecuronium bromide, and potassium chloride"). Arizona's most recent execution was botched. *See, e.g.*, Gary Grado, *Killer Was Given Two Doses of Lethal Injection Drugs in 'Botched' Execution*. Arizona Capitol Times, July 24, 2014 (*available at*

azcapitoltimes.com/news/2014/07/24/az-killer-joseph-wood-given-2-doses-of-lethal-injection-drug-in-botched-execution/).

[33] Tracy Connor, *Georgia Execution of Kelly Gissendaner Postponed for Drug Issue*, NBC NEWS, Mar. 2, 2015 (*available at* www.nbcnews.com/news/us-news/georgia-execution-kelly-gissendaner-postponed-drug-issue-n315651) (stating: "Georgia uses pentobarbital in a one-drug protocol for executions"). All executions in Georgia are currently postponed. Press Release, Georgia Department of Corrections, Court Ordered Executions Postponed – Kelly Renee Gissendaner and Brian Keith Terrell, Mar. 3, 2015 (*available at* www.dcor.state.ga.us/NewsRoom/PressReleases/PR_150303.html).

[34] *Zink v. Lombardi*, Case No. 2:12-CV-4209-NKL, W.D. Mo., Rec. Doc. 147-3 ("Missouri Department of Corrections, Preparation and Administration of Chemicals for Lethal Injection, Oct. 18, 2013").

[35] Execution Procedure Manual for Single Drug Protocol (Pentobarbital), Oct. 24, 2013 (*available at* www.ncdps.gov/div/AC/Protocol.pdf).

[36] Ohio stopped using midazolam after a series of botched executions. *See* Mark Berman, *Ohio Drops Controversial Lethal Injection Drug, Postpones Upcoming Execution*, WASHINGTON POST, Jan. 9. 2015 ("Ohio announced this week that it will no longer execute inmates with lethal injection drugs that were involved in two bungled executions last year, a change that will delay at least one execution and possibly others scheduled for this year."). The protocol is located at http://drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf.

[37] *West v. Schofield*, No. 14-00320, 2015 WL 1044098 (Tenn. Mar. 10, 2015) ("On September 27, 2013, the Tennessee Department of Correction adopted a new lethal injection protocol providing that inmates sentenced to death be

executed by the injection of a lethal dose of a single drug, pentobarbital")

[38] Texas Department of Criminal Justice, Death Row Facts, undated (*available at* www.tdcj.state.tx.us/death_row/dr_facts.html) (stating "Lethal Injection Consists Of: Single drug protocol of Pentobarbital").

[39] Utah Code, Title 77, Ch. 19, § 10: Judgment of death -- Location and procedures for execution (*available at* le.utah.gov/xcode/Title77/Chapter19/77-19-S10.html) (specifying "sodium thiopental; or other equally or more effective substance"). Bill is currently before governor that would reinstate firing squad if lethal injection drugs are not available. H.B. 11, Death Penalty Procedure Amendments, 2015 General Session (*available at* http://le.utah.gov/~2015/bills/static/HB0011.html).

[40] *See Hobbs v. McGehee*, No. 14-542) (oral argument held before Ark. S. Ct. on Feb. 19, 2015); *see also* Act 137 (2013) (*available at* www.arkleg.state.ar.us/acts/2013/Public/ACT139.pdf) (contemplating "intravenous lethal injection of a barbiturate in an amount sufficient to cause death" and that "[b]efore the intravenous lethal injection is administered, the condemned prisoner shall be intravenously administered a benzodiazepine.")

[41] Maura Dolan, *California Will No Longer Pursue Three-Drug Lethal Injections*, LOS ANGELES TIMES, July 10, 2013 (*available at* articles.latimes.com/2013/jul/10/local/la-me-ln-lethal-injection-20130710) (stating "California has dropped its legal efforts to win approval of a three-drug method of lethal injection and will instead propose single-drug executions" and that the DOC "did not know when a new, single-drug method would be unveiled or which drugs the state was considering" but "[t]he process could take years").

[42] In 2014, the Louisiana Legislature enacted a Department of Corrections led commission to "study and make recommendations relative to the different forms of execution and the method of execution to determine the best practices for administering the death penalty in the *most humane manner*." See La. HR 142 (2014). The Report on Study of Methods of Execution & Recommendations for Procedures was issued by the Louisiana Dept. of Public Safety and Corrections on February 18, 2015. The Report recommends utilizing a single drug protocol involving 5 gm of pentobarbital, and also recommended that the legislature consider nitrogen hypoxia as an alternate method. Della Hasselle, *Death Penalty Study Suggests Using Nitrogen to Carry Out Executions*, THE LENS. Mar. 4, 2014 (*available at* http://thelensnola.org/2015/03/04/death-penalty-study-suggests-using-nitrogen-to-carry-out-executions/) (discussing DPSC recommendations to legislature of adopting nitrogen hypoxia method).

[43] Prison where executions are performed has closed, unclear how many usable drugs remain. State of Nevada Legislative Auditor, Performance Audit: Fiscal Costs of the Death Penalty, Nov. 17, 2014, at 68 (*available at* www.leg.state.nv.us/Division/Audit/Full/BE2014/Costs%20of%20Death%20Penalty,%20LA14-25,%20Full.pdf) (stating that the Nevada State Prison, which housed the execution chamber, closed in May 2012, and that "NDOC management indicated it has a usable supply of drugs for an execution, if one were required, at a cost of about $587. However, we do not know how many executions NDOC can perform with the existing stock of drugs, when expiration dates will be exceeded, whether it can still obtain these drugs if more are needed, and what the cost might be to obtain drugs in the future."). Nevada previously used three-drug thiopental protocol. Martha Bellisle, *Nevada No Longer Able to Acquire Key Drug Used in Lethal Injections*, RENO GAZETTE-JOURNAL, Feb. 6, 2011 (*available at* archive.rgj.com/article/20110207/NEWS/105100001/Nevada-no-longer-able-acquire-key-drug-used-lethal-injections)

(discussing "sodium thiopental, one of three drugs used during the lethal injection process").

[44] *Roane et al. v. Holder et al.*. Case No. 1:05-cv-02237-RWR-DAR, Defendants' Status Report. Mar. 2, 2015, Rec. Doc. 348 (stating "[t]he Department of Justice and the Bureau [of Prisons] are currently engaged in a review of the [Lethal Injection Protocol used to effectuate death sentences]. This assessment is ongoing, and no final determinations have been made as to specific changes in the protocol.").

[45] Associated Press, *Delaware Lacks Lethal Injection Drugs Needed to Execute Death Row Inmates*, Mar. 5, 2014 (*available at* www.theguardian.com/world/2014/mar/05/delaware-lethal-injection-drugs-execute-17-condemned-prisoners) ("Under Delaware's current execution protocol, a condemned inmate is rendered unconscious by a sedative or anesthetic before receiving fatal and potentially painful doses of two paralytic drugs, pancuronium bromide and potassium chloride. Delaware used sodium thiopental as the initial drug before its sole U.S. manufacturer stopped making it in 2009. The state then began using pentobarbital."). State drug supply has reportedly expired. *Id.* ("Records show that the correction department obtained 50 vials of potassium chloride from Cardinal Health in February 2013, replacing 51 vials that expired that same month. The current supply of potassium chloride, enough for four executions, expires in October. Meanwhile, supplies of the other two drugs, pancuronium bromide and pentobarbital, expired in July 2012 and September 2013, respectively.")

[46] Announced Brevital (methohexital sodium) in a 3 drug protocol, but no formal protocol change. Associated Press. *Indiana Use of New Execution Drug Draws Opposition*, May 31, 2014 (*available at* www.cbsnews.com/news/indiana-use-of-new-execution-drug-draws-opposition/) (stating "Indiana State Prison Superintendent Bill Wilson selected Brevital as a replacement for sodium thiopental" "as part of its three-drug lethal injection series").

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[47] Mississippi Department of Corrections, Media Kit, Execution by Lethal Injection: Contents of Syringes for Lethal Injection, June 12, 2012 (*available at* www.mdoc.state.ms.us/Media%20Kit/Media%20Kit%20BRAWNER.pdf). Previously used Sodium Thiopental as first of three drugs. Chris Elkins, *Mississippi Affected by Shortage of Execution Drug*, Northeast Mississippi Daily Journal, Jan. 26, 2011 (*available at* djournal.com/news/mississippi-affected-by-shortage-of-execution-drug/) (stating that the state was running low on sodium thiopental and was looking for an alternative drug).

[48] State does not currently have usable drugs. Meg Kinnard, *South Carolina Has Run Out of Lethal Injection Drug*, ASSOCIATED PRESS, Mar. 9, 2015, (*available at* www.thestate.com/2015/03/09/4035143/ south-carolina-has-run-out-of.html) ("Corrections Director Bryan Stirling recently told The Associated Press the state's supply of pentobarbital expired in September 2013 and was discarded, as its effectiveness had worn off. The state still has the other two drugs it uses in its lethal injection — pancuronium bromide and potassium chloride. When South Carolina looked to replenish its pentobarbital supplies, officials found no willing vendors.").

[49] Press Release, Virginia Department of Corrections Adds Alternative Lethal Injection Chemical, Feb. 20, 2014 (*available at* vadoc.virginia.gov/news/press-releases/14feb20_finalLIdrugs release.shtm) (stating that "Midazolam will be added to [Virginia's] list of lethal injection drugs approved for use in conducting state executions" and that it "will serve as an alternative first drug in Virginia's three-drug protocol." *See also* Press Release, Virginia Department of Corrections Adds Alternative Lethal Injection Chemical, May 9, 2011 (*available at* vadoc.virginia.gov/news/press-releases/11may09_pentobarbital.shtm) (stating that "due to the current shortage of Sodium Thiopental, the drug Pentobarbital will be added to [Virginia's] list of lethal injection drugs").

[50] Associated Press, *Alabama's New Lethal Injection Drugs Challenged*, Oct. 4, 2014 (*available at* www.al.com/news/index.ssf/2014/10/alabamas_new_lethal_injection.html) ("The new drug protocol calls for the sequential injections of 500 milligrams of midazolam hydrochloride, a sedative; 600 milligrams of rocuronium bromide, a neuromuscular blocking agent that stops breathing; and 240 'milliequivalents' of potassium chloride to stop the heart.").

[51] Oklahoma Department of Corrections, Policy No. OSP-040301-01: Procedures for the Execution of Offenders Sentenced to Death, Mar. 21, 2014 (*available at* localtvkfor.files.wordpress.com/2014/03/newlethalinjectionprotocol.pdf).

[52] Florida Dept. of Corrections, *Execution by Lethal Injection Procedures*, § (12)(c), Sept. 9, 2013 (*available at* deathpenaltyinfo.org/documents/FLExecProtocol.pdf).